1888.

BHIM SINGH v. SARWAN SINGH.

proceedings, and not by way of a regular suit after the sale has been confirmed. Section 312 distinctly bars a suit to set aside, on the ground of irregularity, an order made under that section, and that includes an order confirming the sale, even when no application has been made under s. 311 to have it set aside. That being so, I am of opinion that the present suit cannot be maintained, and I agree in dismissing the appeal without costs.

H. T. H. *Appeal dismissed.*

## PRIVY COUNCIL.

P. C.* 1888. *March* 8 & 9, *April* 21.

HARI SARAN MOITRA (PETITIONER) *v.* BHUBANESWARI DEBI (FOR HERSELF AND AS GUARDIAN OF JOTINDRAMOHUN LAHIRI, A MINOR) AND ANOTHER (OBJECTORS).

[On appeal from the High Court at Calcutta.]

*Execution of decree—Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.*

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon devested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey* v. *Shamasoondery Debia* (1) referred to, and applied in this case.

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

(1) 3 Moore's I. A., 229.

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

*Held*, also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor.

*Sureshchunder Wum Chowdhry* v. *Jugutchunder Deb* (1) approved.

CONSOLIDATED appeals from two decrees (June 9th and 10th 1884) of the High Court, reversing an order made in execution, and a decree for mesne profits (10th January 1882), by the Subordinate Judge of Rungpore.

The principal question on these appeals related to the enforcement of a decree against a minor, as a consequence of his adoption by the judgment-debtor, a widow, against whom, as representing the deceased manager of family estate, a decree had been obtained by another member of the family for a share. Whether that decree was enforcible against, and mesne profits were claimable from, the adopted minor, through his adoptive mother as his guardian, the above decree having been made without his having been formally made a party thereto, was the first question. Other points were in dispute, *viz.*, as to what property was to be included in the execution; as to the relative liability of the judgment-debtors among themselves; and as to whether their liability was joint, or several.

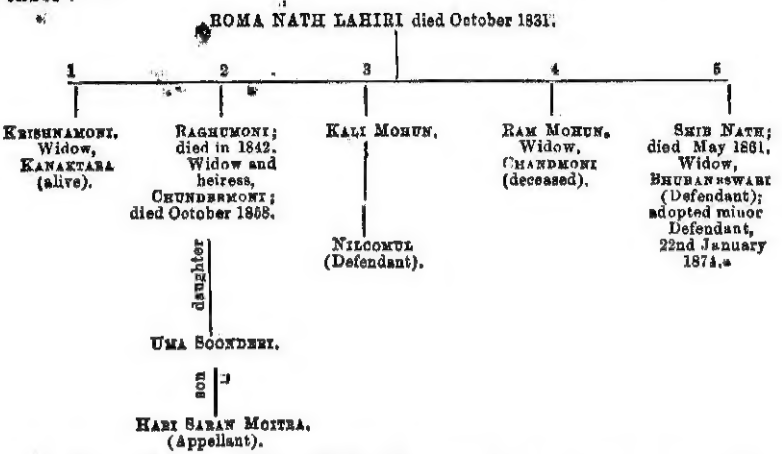
The first of these appeals arose out of a petition by the present appellant, as decree-holder, for execution of a decree (22nd December 1874), made in his favor by the High Court in a suit brought in 1870 against Bhubaneswari Debi, Nilcomul Lahiri, and Kanaktara Debi; and affirmed by an order (20th November 1880) of Her Majesty in Council. This decree declared his mother, Umasoonderi, whom he now represented, to be entitled on partition to the possession of a share in the joint family estate. The other appeal was from a decree (10th January 1882) in a suit brought by the present appellant for mesne profits of the share in lands to which the decree of 1874 had established his title. Execution was sought, and the suit for mesne profits was brought, against the present respondents, Bhubaneswari Debi, for herself, and as guardian of the minor Jotindramohun Lahiri, and Nilcomul Lahiri.

(1) I. L. R., 14 Calc., 204.

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

The relationship of the parties appears in the following table :—




In the suit brought in 1870 Umasoonderi claimed to establish her title, as heiress of her father, Raghumoni, to a one-fifth share of the estate which had been Romanath's, together with the accretions thereto made by Shibnath, as manager of the family till his death, and she asked to have set aside as against her a partition alleged by the defendants to have been made by Romanath on October 26th, by which he purported to give a 3-anna share of his estate to his eldest son, Krishnamoni, and shares of 2½ annas to his other sons, and to reserve the remaining 3 annas for himself, and also to set aside a deed of sale, dated 2nd March 1856, by which Chundermoni, the plaintiff's mother, purported to sell to Shibnath a one-fifth part of her 2½ anna share.

The details of the property, claimed as being subject to partition, were given in two schedules, the first of which comprised inherited land belonging to the family, and the second stated the property acquired by the family whilst joint.

The decree of the Subordinate Judge of Rungpore (13th December 1872) was in favor of the plaintiff as to part of her claim; and it was, in the main, affirmed by the High Court (24th December 1874), the decree being in the terms set forth in their Lordships' judgment below.

The adoption of Jotindramohun, meantime, and pending the proceedings by Bhubaneswari in appeal, took place (under an

*anumati patro* contained in the will of Shib Nath) on 22nd January 1874 (1). But Jotindramohun was not made a party to the appeal by any proceeding before the Court. And from the decree of the High Court, Bhubaneswari alone appealed to Her Majesty in Council, whose order (20th November 1880) followed the judgment reported in *Bhubaneswari Debi* v. *Hari Saran Moitra* (2).

Application for execution was made by the present applicant, whose name had been substituted for that of his mother, by that time deceased, on the 9th April 1881.

This application was against "Bhubaneswari for herself, and as guardian on behalf of the minor Jotindramohun Lahiri," and also against Nilcomul to recover possession of the immoveable properties mentioned in the plaint, and in the decree, as also of certain moveable properties, or their value. As to the last, the moveables, there was no dispute on this appeal.

The suit for mesne profits was brought on the 12th April 1881 against the same parties as defendants, so as to include Bhubaneswari in her individual capacity, and the minor through her as guardian, together with Nilcomul.

Bhubaneswari objected that she was not liable in the execution proceedings, having, before the decree of 1874, adopted the minor, who, on the advice of Nilcomul, was not made a party in the appeal of the principal suit; and she defended the suit for mesne profits on similar grounds, throwing the liability on to Nilcomul. In neither of these proceedings, not in the execution nor in the suit, could the minor be held liable, because he had not been a party to the decree of 1874. On the merits, Bhubaneswari represented that Nilcomul was entitled, on the whole, to no more than a four annas thirteen gundas share, while she herself was entitled to an equal share, with some addition; and she alleged that Nilcomul had admitted, in the previous litigation, possession of six annas ten gundas, showing thereby that he had, without title, an excess of one anna seventeen gundas.

(1) See *Bhubaneswari Debi* v. *Nilcomul Lahiri*, I. L. R., 12 Calc., 18, and *Sotishchunder Lahiri* v. *Nilcomul Lahiri*, I. L. R., 11 Calc., 45.

(2) I. L. R., 6 Calc., 720.

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

Nilcomul, by his objections to the execution and in his defence to the suit for mesne profits, insisted that he was in possession of only his rightful share, and that the decree-holder should look only to Bhubaneswari, who was in possession of a five annas share; whereas, at the outside, she had only a right to her husband's quota of three annas and four gundas, together with what the latter might have obtained from Kanaktara's share. This objector further alleged that, if he should be held at all liable, such liability would be limited to the two gundas share, held by him in excess of the six annas eight gundas share, to which, under the decree itself, he was entitled.

One Rudrachunder Roy also filed objections on behalf of the minor, founded, like those taken by Bhubaneswari on his behalf, on his not having been a party to the decree of 1874.

The Subordinate Judge of Rungpore, Bhugwan Chunder Chukerbati, on the question of the minor's liability through his guardian, both in the execution, and in the suit for mesne profits, was of opinion that Bhubaneswari having acted for the minor's interests, he was bound by the result of her appeals. His judgment on this point was as follows: "In fact, the appeals were prosecuted and defended by her with the *bonâ fide* intention that her husband's real rights had been interfered with. On that understanding she went up even to the Privy Council, without alluding to the fact of her having adopted a son. There is no reliable evidence that the plaintiff knew of the adoption having been validly effected. I am inclined, therefore, to follow the rulings in *Ramkishore Chuckerbutty* v. *Kally Kanto Chuckerbutty* (1) and *Jotendro Mohun Tagore* v. *Jogul Kishore* (2), and to hold that the minor Jotindramohun will be liable for the wasilat, which tantamounts in substance to the effect that the estate of his adoptive father will be virtually liable, inasmuch as it was for his interest that the suit was defended, and the appeal carried up to the highest tribunal; and so he cannot evade the consequences of the act which was done with a motive to render his future good, though the result turned out otherwise than was anticipated."

(1) I. L. R., 6 Calc., 479; 8 C. L. R., 1.
(2) I. L. R., 7 Calc., 357; 9 C. L. R., 57.

The Subordinate Judge was of opinion, also, that the liability of the defendants was several, as they were severally in possession, and he awarded to the decree-holder "possession and wasilat of his decretal share from each of them exclusively and separately."

Finding that Bhubaneswari held, for herself, and as guardian of the minor, five annas, that Nilcomul had six and a half annas and Kanaktara two and a half annas, while the decree-holder had two annas only, the Subordinate Judge decreed that "possession be given to the decree-holder of his remaining one anna and four gundas in the following proportion, *viz.*, thirteen and two-third gundas from Bhubaneswari, representing the minor adopted son, and ten and one-third gundas from Nilcomul. As respects properties which each of the judgment-debtors holds in his exclusive possession, he or she should make over to the decree-holder the full decretal share, which is three annas four gundas."

The Subordinate Judge also decreed to this appellant interest upon wasilat to the end of each year, and describing the properties or plots of land for which wasilat was due, and in whose possession they respectively were, he made a decree for payment to the plaintiff by Bhubaneswari, as guardian of the minor Jotindramohun, for mesne profits with interest, the sum of Rs. 3,297, and by Nilcomul, the sum of Rs. 2,394; adding interest to the date of payment.

In a separate judgment in the execution case, the Subordinate Judge decided against this appellant as to the building being included in the execution; being of opinion that the High Court, in awarding, to the then plaintiff, a share "of all the property" named in the two schedules, intended to include only the landed property therein, and not the buildings and moveables.

Rudrachunder Roy was not recognized by the Subordinate Judge as a party to the proceedings in the character of next friend of the minor, the Judge being of opinion that in the execution proceedings he should not be allowed to appear on behalf of the minor, whose interests the adoptive mother could sufficiently protect. Rudrachunder, however, filed a petition of appeal to the High Court, in the execution case, on behalf of the minor. Bhubaneswari also appealed, taking the same objections as were

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

taken by Rudrachunder to the execution against the minor. She appealed also on her own behalf. Nilcomul Lahiri also appealed against the order in execution; and the petitioner, Hari Saran Moitra, filed objections in the form of a cross-appeal, from the order as to the buildings and the moveables. Against the decree for mesne profits, both Bhubaneswari, for herself and as guardian of the minor, and Nilcomul Lahiri appealed.

A Division Bench of the High Court (McDONELL and FIELD, JJ.) reversed the decision of the first Court on the question of the minor's liability upon execution of the decree of 1874, and in the suit for mesne profits. They held that making a person's guardian defendant to a suit was not the same thing as making that person himself a party, and that this was not affected by the fact of his being a minor. The procedure of the Code had not been followed, and it contemplated a minor being made a party to the suit in his own name, directing that the Court, on being satisfied of the fact of his minority, should appoint a proper person to conduct his defence. They added: "In this case the plaintiff did not make any application to the Court to have a guardian *ad litem* appointed for the minor. There was an application made by a third person, who urged that he, and not Bhubaneswari, ought to be appointed guardian of the minor; but this was rejected, and the Subordinate Judge thought that Bhubaneswari was the minor's proper guardian. The Subordinate Judge was thus aware of the fact of Jotindramohun's minority, and being so aware, it was his duty to follow the procedure provided by s. 456. This, however, he did not do. Bhubaneswari then objected, and still objects, to being made a guardian *ad litem*. No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to become bound by the decree."

In regard to Bhubaneswari's individual responsibility under the decree, the Judges said: "But then it is contended that Bhubaneswari Debi is bound. She was made a defendant in a double capacity, for self and as guardian on behalf of the minor. In her personal capacity no decree has been passed against her. ..... .....If the decree

against Bhubaneswari Debi, in the form in which it has been made, that is, in her capacity as agent or manager, is allowed to stand, it is clear that the Court would have no authority to enforce it as against the minor, who was not a party to the suit, and who cannot be affected by this decree. We think, therefore, that the decree as made against Bhubaneswari Debi, guardian or manager of the minor, cannot be allowed to stand."

The Judges held that the Subordinate Judge was wrong in dealing with the decree of 1874, as if it had been a separate decree against each of the two judgment-debtors. In their opinion it was a joint decree and should be so executed as to give this appellant possession of an undivided share of three annas four gundas in every plot of the immoveable property.

As to the buildings, the decree-holder had, the Judges found, taken no steps either under the Code (s. 137) to have the original plaint made part of the execution record, or to file a certified copy of the two schedules. They, therefore, left this matter for the Subordinate Judge to see that a certified copy of the schedules annexed to the plaint was filed.

Dealing with Nilcomul's appeal, the Judges held that he was rightly entitled to a six annas eight gundas share, being three annas four gundas inherited by him from his father, and a similar share, which fell to him on the death of Chandmoni; so that, being in possession of six annas ten gundas, he held only two gundas over and above his proper share. Their judgment on this point was the following: "As regards these two gundas, the possession of Nilcomul being admitted, there must be a decree for mesne profits, and these mesne profits will be calculated upon the figures which the Subordinate Judge has taken in his decree. The result will be, that the appeal of Bhubaneswari will be decreed, and so far as she is concerned, the decree of the lower Court will be set aside. There will be a declaration that the minor Jotindramohun Lahiri has not been properly made a party to these proceedings and is in no way affected by the result. As regards Nilcomul, there will be a decree for mesne profits for four years, 1284 to 1287, upon two gundas of the property only."

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

The decree on Nilcomul's appeal was that, in lieu of the award to the plaintiff of Rs. 5,692, as mesne profits, the sum of Rs. 475 was payable only in respect of the two gundas share. In regard to the possession to be given to the decree-holder, under the execution order, the order of the lower Court was varied by awarding to the decree-holder possession, as against both Bhubaneswari and Nilcomul jointly of an undivided three annas and four gundas share in every plot of land in dispute, giving to the decree-holder a one anna four gundas share in the plots in which he, or his mother, had possession of a two annas share before suit, and a three annas four gundas share of those plots in which he, or she, had no previous possession.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellant, argued that the Appellate Court should have held that the minor, having become to all intents a party to the decree of 1874, upon the devolution of estate upon him, consequent on his adoption, the decree was enforcible against him; and that he was also liable in the suit for mesne profits. Whether Bhubaneswari sufficiently represented the minor as his guardian had been a question for the Subordinate Court before allowing the execution to proceed. The Court had allowed it to proceed, and thus the question had been disposed of. If any irregularity had taken place in the matter, it could not now be made a ground for reversing the order of the Court executing the decree, inasmuch as no material injury had been, or could be, shown to have resulted. At the time when the proceedings in appeal were taken, and the decree was passed, s. 11 of Act XXIII of 1861, amending Act VIII of 1859, was in force. The minor's liability, through his guardian, was not affected, either as regarded the proceedings against him in execution, or the suit for mesne profits; there being nothing to prevent that liability from devolving upon him, represented as he was by his guardian, along with the interest which he took in the estate, which was bound by the decree of 1874. The minor was substituted for Bhubaneswari from whom both interest and liability passed, on the adoption, in her capacity as representing the estate, to her as representing the minor as his guardian. The parties who for the time being were entitled to

the estate were those against whom the Subordinate Judge had rightly ordered execution, and the liability for mesne profits rested on the decree. The minor had not been precluded from taking any real objection if he had had one to maintain.

[SIR R. COUCH, in reference to the guardianship of the mother, referred to Sir T. Strange's Hindu Law, vol. 2, appendix to Chap. VIII, and vol. 1, cap. 3, para. 4.]

Any merely formal defect had been cured by the action of the first Court and the proceedings taken. Accordingly, both as to the execution by delivery of possession to the appellant, and as to the award of mesne profits, the decree of the High Court was erroneous and should be reversed. On the merits also, the appellant was entitled to the possession of the shares as ordered in the Court of first instance against the defendants under the decree of 1874.

[In reference to the question of guardianship, SIR B. PEACOCK referred to *Doorgapersad* v. *Keshopersad Singh* (1).]

The following cases were referred to in the argument for the appellant: *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (2); *Manager of Raj Dharbanga* v. *Coomar Ramapat Singh* (3); *Bissessur Lal Sahoo* v. *Luchmessur Singh* (4); *Hunoomanpersad Panday* v. *Munraj Konwaree* (5); *Jogulkishore* v. *Jotendromohun Tagore* (6); *Jairam Rajah* v. *Joma Kondlia* (7); *Kishen Singh* v. *Mareshwar* (8); *Komul Chunder Sen* v. *Surbessur Dass Gooptoo* (9); *Jogi Singh* v. *Kunj Behari Singh* (10); *Alim Baksh Fakir* v. *Jhalo Bibi* (11); *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (12).

(1) L. R., 9 I. A., 27; I. L. R., 8 Calc., 656.
(2) Marsh, 614.
(3) 14 Moore's I. A., 605.
(4) L. R., 6 I. A., 233.
(5) 6 Moore's I. A., 393.
(6) L. R., 11 I. A., 166; I. L. R., 10 Calc., 983.
(7) I. L. R., 11 Bom., 361.
(8) I. L. R., 7 Bom., 91.
(9) 21 W. R., 298.
(10) I. L. R., 11 Calc., 509.
(11) I. L. R., 12 Calc., 48.
(12) I. L. R., 14 Calc., 429.

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

Mr. *R. V. Doyne*, for the respondent Nilcomul Lahiri, argued that the appellant's rights under the decree of 1874 were fully satisfied by the terms of the decrees of the High Court. Against him the appellant had not made out any further claim than to receive the three annas four gundas share decreed in 1874; and in finding that Nilcomul had obtained possession of no more than he was entitled to, with the small exception of two gundas, as to which the decree for mesne profits had been allowed to remain, the High Court had come to a correct decision.

Mr. *Lawrence Biale*, for the respondents Bhubaneswari, and the minor adopted son Jotindramohun, argued that the decision of the High Court was correct. It could not be held that the minor had been constructively a party to the decree of 1874, and in consequence of his not having been represented by a duly constituted guardian *ad litem*, at the time when the proceedings took place, resulting in the decree of 1874, the decree could not be held to be binding upon him. The Minors' Act, XL of 1858, in s. 3, required that a minor in a suit should be represented by his duly authorized guardian, and the procedure was prescribed accordingly. This was in accordance with general principles, and that Bhubaneswari, not being duly appointed, could yet be the guardian of Jotindramohun so as to represent him in the suit had not been shown. The main point was that all that had occurred before the decree of 1874 had been insufficient to bring the minor before the Court, or his name on to the record; and that, without having been properly represented and heard by his guardian, he could not be treated as one of the judgment-debtors, who were parties to that decree, which must receive effect, as it stood, against those who were parties in it. The High Court had correctly refused to allow execution of that decree to proceed on this application against Bhubaneswari in her personal capacity; for in that character she had ceased upon the adoption to be responsible; while, at the same time, the adopted son could not be held liable through her, inasmuch as she had not been appointed his guardian *ad litem*; and there had been no formal appointment made, such as alone could empower her to act in defending the minor's interest. This was a point on which an order was required at the proper stage, when application

should have been made. And it was not apparent that Bhubaneswari was in a position to represent the minor's interests as well as her own. It was, at all events, against the minor's interest that he should be taken to have been made a party, without the necessary and proper steps having been taken to make him one, and to give him an opportunity of being heard. This was the irregularity, and a most material one. In the case of a minor, the strict rule as to the joinder of parties should have been applied, and it could not be said that the omission was an immaterial one. True it was that the enforcement of decrees against persons upon whom interests had devolved, after such decrees had been passed, was a proceeding permitted in some well ascertained cases of successive liability. This appeared from the cases decided under Act VIII of 1859, chap. IV, ss. 109-206. See the note, collecting the cases, in Mr. W. Macpherson's edition of 1871, of the Code of Procedure. But there was no case in which a minor, without having been represented by a duly appointed guardian, had been held to be a party to a decree only by reason of his adoption. The High Court might have said that the minor was not liable in either the suit for mesne profits, or in the execution proceedings, as the same considerations applied in regard to the minor's liability upon either the one or the other; but the result at which the Court had arrived was right. He referred to *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (1); *Bissessur Lal Sahoo* v. *Luchmessur Singh* (2).

[SIR R. COUCH referred to *Dhurm Dass Pandey* v. *Shamasoondery Debia* (3).]

The argument was that although, as in that case, the minor could receive a benefit, and an omission would not deprive him of an advantage, yet that, before his estate could suffer detriment, he must be represented and heard.

On the merits, as against Bhubaneswari and the minor, the actual rights of the appellant were, it was contended, fully satisfied by the decree of the High Court. In respect of mesne profits, Nilcomul, as in effect had been decided, should alone be held responsible.

(1) Marsh, 614. (2) L. R., 6 I. A., 233.
(3) 3 Moore's I. A., 299.

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

Mr. *J. D. Mayne* replied, pointing out that in the cases already cited in the argument for the appellant, the defendants, against whom execution was allowed, were not parties to the decrees, which, however, were held to bind the property in their hands. So here the property was bound by the decree of 1874. The appellant wanted nothing to be added to the decree to make it effective in his favor; the liability of the adopted son being correlative with his right to succeed, the latter right being shown on his taking the benefit of a decree in his guardian's favor in the case of *Dhurm Dass Pandey* v. *Shamasoondery Debia* (1).

Their Lordships' judgment was delivered, on a subsequent day (April 21st), by

SIR R. COUCH.—In 1870 Uma Soonderi Debi, the mother of the appellant, and daughter and heiress of Raghumoni, who was one of five brothers, sons of Roma Nath Lahiri, forming a joint Hindu family, brought a suit against Bhubaneswari Debi, the widow of Shib Nath, one of the brothers, who had managed the family property, Nilcomul, the son of Kali Mohun, another brother, and Kanaktara, the widow of Krishnamoni, another brother. These were the only members of the family who were then alive, Ram Mohun, the fifth brother, having died without issue, leaving a widow, who was then also dead. In the suit Uma Soonderi claimed to recover possession of her father's share of the family property, which was said in the plaint to consist of land mentioned in schedules Nos. 1 and 2, and pucca buildings and personal properties. Schedule No. 1 contained the lands which the brothers had inherited from their father, and No. 2 the lands which were said to have been acquired whilst the members of the famil[illegible] mensality. On the 13th December 1872 the of Rungpore made a decree in favour of Um of part of the share which she had claimed. T wari, Uma Soonderi, and Nilcomul separa High Court, which, on the 22nd December 1 in the following terms: "It is ordered and d of the lower Court be varied, and in lieu thereo and declared that the plaintiff is entitled gundas share (the share claimed) of all

(1) 3 Moore's I. A. 299.

is named and described in the two schedules appended to the plaint." And Uma Soonderi having before the suit been put in possession of 2 annas of the property named and described in the first schedule, it was ordered and decreed that she should recover from the defendants possession of the remaining 1 anna and 4 gundas, and possession of 3 annas 4 gundas of the property named and described in the second schedule. Thereupon Bhubaneswari appealed to Her Majesty in Council, who, by an order in Council, made on the 20th day of November 1880, affirmed the decree of the High Court. Whilst the appeals were pending in the High Court, Bhubaneswari adopted a son, Jotindramohun Lahiri; but she continued to prosecute her appeal in that Court, and appealed to Her Majesty in Council in her own name, taking no notice of the adoption. On the 9th April 1881, Uma Soonderi having died, the appellant as her heir made an application to the Court of the Subordinate Judge for execution of the decree. It stated that the enforcement of the decree was sought against Bhubaneswari for self and as guardian on behalf of the minor Jotindramohun Lahiri, and against Nilcomul Lahiri. Execution was not sought against Kanaktara, who was said in the judgment of the High Court to have made no defence to the suit. The reason of this may be that she was not in possession of more than her husband's share. On the 12th of April 1881 the appellant brought a suit in the same Court for mesne profits, naming as the defendants Bhubaneswari Debi, for self and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri. The Subordinate Judge, on the 10th January 1882, gave judgment in both cases, referring in one judgment to the other where the question appeared to him to be the same. The judgments will be more conveniently stated hereafter. In the execution case Jotindramohun, by his next friend Rudrachunder Roy, appealed to the High Court. This person had presented a petition of objection, as next friend of the minor, to the Court of the Subordinate Judge. He was not shown to have obtained any authority to act as next friend of the minor, and is said to have been a servant of Bhubaneswari. She also appealed, taking the same objections as regards the minor as were taken by the assumed next friend. Nilcomul also appealed, and Hari Saran

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

Moitra, the present appellant, filed objections by way of cross-appeal. In the suit for mesne profits both Bhubaneswari and Nilcomul separately appealed.

On the 9th of June 1884 the High Court gave judgment in the suit for mesne profits, and on the 10th in the execution case, and the present appeal is from the orders or decrees made upon those judgments.

In the execution case there are three questions: (1) whether execution can be had against the minor personally or against Bhubaneswari; (2) whether the pucca buildings and moveables are to be included in the execution; (3) whether possession in execution was to be given against the parties jointly or severally. Upon the first of these questions the Subordinate Judge said :—

"Whether the execution in this case should proceed against the minor personally or against his adoptive mother is a point which has been equally raised and decided in the decree-holder's suit for wasilat, No. 26 of 1881. The question being similar the same judgment should govern them both. I hold, therefore, under the decision I have this day delivered in the trial of issue 7 in the above suit for wasilat, that the execution should be carried out against the minor, and hence against the estate left by his adoptive father. Bhubaneswari, for herself, cannot be made personally liable when the assets of her husband are available at hand to fulfil the conditions of the decree. Then, as apparent from the record of the suit No. 26, Bhubaneswari was a defendant in the original suit in the capacity of a representative and in possession of her husband's estate. That possession is still with her, though, since the adoption, it has been converted to one on behalf of her minor son. The minor is also under her guardianship and protection. Bhubaneswari is, therefore, the proper person to represent the minor, and I do not think it equitable that Rudrachunder Roy, almost a stranger, should be allowed to stand on behalf of the minor when his connection is far remoter than that of Bhubaneswari, who protects the minor, and is his nearest kindred as the adoptive mother."

On the same question the High Court said :—

"The present appeal arises out of proceedings taken to execute the decree in the title suit passed by the High Court, and confirmed on appeal by the Privy Council. It is contended that that decree cannot be executed against the minor Jotindramohun Lahiri, because he was not a party to it, and those steps which, according to law, might have been taken to make him a party were not taken. Section 372 of the Code of Civil Procedure provides for making the assignee or other transferee of the interest of a defendant a party to the suit when the assignment or transfer has been made during the pendency of the suit. No action was taken under this section. It has been

urged that the devolution of the defendant's interest upon the adopted son by reason of the adoption was not known to the decree-holder, and that therefore he could not take the necessary steps to make the minor a defendant. This may be so, but upon this point we pronounce no opinion. We further pronounce no opinion upon the question whether the minor is bound by the decree in the title suit. All we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record."

Their Lordships find a difficulty in understanding what the High Court meant by this judgment. The Code of Civil Procedure referred to must be Act X of 1877, as s. 372 of the previous Code relates to special appeals. Act X of 1877 came into force on the 1st October 1877, nearly three years after the decree of the High Court. If it was material that no action was taken under s. 372, it appears to their Lordships that the question whether the adoption was or was not known to the decree-holder was a matter upon which an opinion should have been pronounced. What follows is still more difficult to be understood. The Court say: "We pronounce further no opinion upon the question whether the minor is bound by the decree in the suit; all we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record." In the suit for mesne profits, where Bhubaneswari was sued as widow for self and as guardian on behalf of the minor, they say: "Now there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. . . . A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name," and decide that the minor was not bound by the decree. Their Lordships are unable to see why the High Court, having said in the suit for mesne profits that the minor was not bound by the decree, declined on the next day to pronounce an opinion upon the question.

It was just as necessary to decide the question in the execution proceedings as in the suit for mesne profits. The decree in the original suit was sought to be enforced against Bhubaneswari personally and as guardian of the minor. So far as he was

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

concerned the sole question was whether the decree bound him. If it did, execution was rightfully sought against him through his guardian, and it was no answer that his name was not on the record.

The decree of the Subordinate Judge, made as it was before the adoption, when Bhubaneswari was the owner of the estate and fully represented it, was binding on the minor. It took away part of the estate of which Shib Nath was in possession when he died. After the adoption it was for the interest of the minor that Bhubaneswari's appeal should be prosecuted, and the appeals of Uma Soonderi and Nilcomul defended. Bhubaneswari's estate had been devested, and she could obtain nothing, but as the adoptive mother and guardian of the minor it would be right for her to continue to defend the suit. There has been no suggestion that it was improperly defended, or that the appeal to Her Majesty in Council was not proper. In his judgment in the suit for mesne profits the Subordinate Judge says: "In fact, the appeals were prosecuted and defended by her with the *bonâ fide* intention that her husband's real rights had been interfered with." If her appeal had been successful, Bhubaneswari, as the guardian of the minor, would have been kept in possession of the whole of what Shib Nath died possessed of, and would have been accountable to the minor for it. In *Dhurm Das Pandey* v. *Shama Soondery Debia* (1) a Hindu widow brought a suit for partition, and to be put in possession of her husband's share in the joint undivided estate. Pending the suit she adopted a son, and notwithstanding the adoption, the suit was prosecuted in the widow's name, and a decree made directing her to be put in possession. Their Lordships said (page 243): "All the facts being stated, it is assumed as matter of law that after she had executed the act of adoption, she prosecuted the suit only as guardian of her adopted son. Then, as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered for his benefit, and that she is put in possession as trustee for him." Their Lordships are of opinion that this principle is applicable in the present case, that the minor is bound by the decree in

(1) 3 Moore's I. A., 229.

the title suit, and the High Court was in error in allowing his appeal in the execution case, which they have done by their decree in the appeal No. 97.

The next question is as to the pucca buildings and moveables. The decree of the High Court in the original suit was: "It is ordered and decreed that the decree of the lower Court be varied, and in lieu thereof it is hereby decreed and declared that the plaintiff is entitled to 3 annas and 4 gundas share of all the property which is named and described in the two schedules appended to the plaint." The moveables were in a separate inventory, and it is now admitted that execution cannot be had in respect of them. As to the pucca buildings the Subordinate Judge said: "I consider it to have been purely the intention of the High Court that, in awarding a decree in favour of the plaintiff for a 3 anna 4 gundas share of all the property which is named in the two schedules, only the landed property was meant, and decided upon without relevancy to the buildings or moveables." But as it had been contended that the decree literally included the buildings, he thought it equitable that the decree should be returned to the decree-holder for amendment in the proper Court, and then the execution be revised in conformity with the judgment. The judgment of the High Court upon which the decree was drawn up used exactly the same words, and so there could be no amendment. The effect, therefore, was that execution in respect of the pucca buildings was refused.

The High Court dealt with the question in a rather singular way. They said that, in order to discover what the property was, they must refer to the two schedules appended to the plaint, and as the decree-holder had taken no steps to have the original plaint made a part of the execution record, or to file a certified copy of the two schedules, they were unable to discover from the record whether the pucca buildings and the moveable property were or were not included in the schedules annexed to the plaint. The Subordinate Judge had inserted in his decree two schedules which were described as schedules of immoveable property under claim, and had awarded a 2½ annas share of the landed properties stated in those schedules. The High

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

Court varied the decree by giving a larger share. It was obvious that they intended this to be a share of the same property, *viz.*, what was described in the decree of the Subordinate Judge as under claim, that is, claimed in the plaint. If proof of the contents of the schedules to the plaint was necessary, the Court might have postponed giving judgment, and allowed a certified copy to be filed. Their Lordships are of opinion that such proof was not necessary, and that the cross-appeal upon this question, which was No. 125, ought to have been allowed, and the order appealed from varied by including the pucca buildings.

As to the third question, namely, whether possession in execution was to be given against the parties jointly or severally, which was raised in the appeal No. 126, the High Court decided that decree ought to be executed by giving the decree-holder as against Bhubaneswari and Nilcomul a 1 anna 4 gundas share in the plots of which he already had possession of 2 annas, and 3 annas 4 gundas of the plots in which he had no possession. They accordingly ordered, in the appeals Nos. 125 and 126, that the objections or cross-appeal should be disallowed, and, except as aforesaid, the order of the Subordinate Judge should be varied by awarding to the decree-holder possession jointly as against Bhubaneswari and Nilcomul of an undivided share of 3 annas 4 gundas in every plot of the land in dispute.

The learned Counsel for the appellant has not disputed that the possession is rightly awarded jointly against the parties liable to have it recovered from them.

So far, the decree of the High Court may stand; but their Lordships being of opinion, as has been stated, that the minor is bound by the decree, and that execution may be had against him, the decree in the appeal No. 97 will be reversed, and the appeal dismissed with costs, and the decree in Nos. 125 and 126 will be varied by ordering that appeal No. 125 should be dismissed with costs, and by allowing the plaintiff's objections or cross-appeal so far as regards the pucca buildings, and by including them in the award of possession. And their Lordships will humbly advise Her Majesty accordingly.

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

The action for mesne profits has now to be considered. In this the questions are: (1), whether the liability was joint or several; (2), whether Jotindra Mohun was liable. In the title of the plaint the defendants are stated to be Bhubaneswari Debi, widow of the late Shib Nath Lahiri, for self, and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri. The Subordinate Judge decided that the liability of the defendants should be separately assessed, and looking at the possession of the joint ancestral property, which he said had been fully admitted in the suit by all the parties concerned in it, he found that out of the 1 anna 4 gundas share in the joint ancestral property which had been decreed in favour of the plaintiff, 13¾ gundas share was in possession of Bhubaneswari, and 10¼ gundas share in the possession of Nilcomul. Accordingly he decided that with respect to the land held in common, the mesne profits were to be calculated and separately charged in these proportions. As to the second question, he said that the appeals to the High Court and Her Majesty in Council were prosecuted by Bhubaneswari "with the *bonâ fide* intention that her husband's real rights had been interfered with;" and inasmuch as it was for the interest of Jotindramohun that the suit was defended and the suit carried up to the highest tribunal, he held him to be liable for the mesne profits. The decree awarded for mesne profits within the period allowed by the law of limitation a total sum of Rs. 5,692-7-2 pies, and ordered that the plaintiff should recover from Bhubaneswari as guardian on behalf of the minor Jotindramohun Rs. 3,297-10-2 pies, and from Nilcomul Rs. 2,394-13 annas. Both Nilcomul and Bhubaneswari appealed to the High Court,—the former on the ground that the plaintiff was not entitled to recover from him the 10¼ gundas share, and at the most he was not liable to make good more than 2 gundas, and Bhubaneswari on the ground that Jotindramohun was not properly made a party to the suit, and should not have been held liable.

The High Court in their judgment deal first with this question. They say: "In the plaint the minor is not made a defendant. The defendants are Nilcomul Lahiri and Bhubaneswari Debi as widow of the late Shib Nath Lahiri, and as guardian on behalf of the

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

minor Jotindramohun Lahiri. Now there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. There is no excuse for ignorance as to the proper procedure in respect of minors, seeing that the provisions contained in the present Code of Civil Procedure became law nearly seven years ago, in 1877. A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name." And after referring to the provisions for the appointment of a guardian *ad litem* they say: "No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to be bound by the decree."

In *Sureshchunder Mum Chowdhry* v. *Jugut Chunder Deb* (1) a plaint in a suit described one of the defendants thus: "N. C., guardian, on behalf of her own minor son, S. C.," and it was held by a Full Bench of the High Court at Calcutta that, it appearing that the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, it could not, without proof of prejudice, invalidate a decree against him in the suit; also, that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit when it appeared on the face of the proceedings that the Court had sanctioned the appointment. Their Lordships are satisfied that the suit for mesne profits was substantially brought against the minor. The 7th issue decided by the Subordinate Judge contained the question whether he could be made liable when he was not a party in the former suit. And the grounds of appeal in Bhubaneswari's appeal to the High Court show that she appealed on his behalf as well as her own. It is also apparent that the Subordinate Judge treated her as appearing in the suit as guardian, and sanctioned it. This is very clear in his judgment in the execution case before quoted. He says: "The minor is also under her guardianship and protection; Bhubaneswari is therefore the proper person to represent the minor." Their Lordships, therefore, are of opinion that the High Court was in error in decreeing that the suit

(1) I. L. R., 14 Calc, 204.

should be dismissed as against Jotindramohun, and declaring that he was not a party to it and was not bound by the result of the proceedings.

In the appeal by Nilcomul, the High Court said that the Subordinate Judge did not find that Nilcomul was in possession of any portion of the property in excess of the share to which he was himself legally entitled, but that he had been in possession of 6 annas 10 gundas had been practically admitted before them at the hearing of the appeal, while a title to more than 6 annas 8 gundas was not asserted. It was also admitted in his written statement. They thought, therefore, that, except as regards the 2 gundas, the plaintiff had not proved that Nilcomul was, during the years for which mesne profits were claimed, in possession of any portion of the property, the title to which was concluded by the decision in 1880. They therefore held that, as regards the 2 gundas, there must be a decree for mesne profits calculated upon the figures which the Subordinate Judge had taken in his decree. Accordingly they varied his decree by decreeing that Nilcomul should pay, instead of the sum awarded by that decree, the sum of Rs. 475 only, as mesne profits, with interest thereon from the 10th of January 1882, the date of the decree of the lower Court. The learned Counsel for the appellant did not object to this decision, nor did the learned Counsel who appeared for Bhubaneswari and the minor object to it. Further, it is not disputed that the aggregate of the portions of the property of which Nilcomul and Bhubaneswari have been in possession during the years for which mesne profits have been awarded shows an excess over their lawful shares at least equal to the share of which the plaintiff has been wrongfully deprived. Consequently, if Nilcomul held only 2 gundas, Jotindramohun would be liable for the mesne profits of the remainder, and the plaintiff would be entitled to recover the balance of the total sum of Rs. 5,692-7-2 pies awarded for mesne profits from his estate. This would be Rs. 5,217-7-2. Therefore the decree of the High Court in the appeal by Bhubaneswari (appeal No. 130 of 1882) should be reversed, and the appeal dismissed with costs, and in lieu thereof, and of the decree of the Subordinate Judge, it should be decreed that the plaintiff do recover from

1888

HARI SARAN MOITRA v. BHUBANESWARI DEBI.

Bhubaneswari as guardian on behalf of the minor, Jotindramohun, the sum of Rs. 5,217-7-2, with interest at 6 per cent. per annum from the 10th January 1882, and costs of the suit in the first Court in proportion to the whole of the claim allowed. The decree of the High Court in appeal No. 121 of 1882, so far as it relates to payment by Nilcomul Lahiri and to costs, will be affirmed. Their Lordships will humbly advise Her Majesty accordingly.

With regard to the costs of these appeals, their Lordships think that the proper course will be to order the appellant to pay the costs of the respondent Nilcomul, and that the appellant's costs, but not including what he is ordered to pay to Nilcomul, be paid by Bhubaneswari as guardian on behalf of the minor.

*One of the consolidated appeals allowed: in the other, decree affirmed.*

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondent, Nilcomul Lahiri: Messrs. *Gordon & Dalbiac.*

Solicitor for respondents, Bhubaneswari Debi and Jotindramohun Lahiri: Mr. *S. G. Stevens.*

C. B.

---

P. C.*
1888
*April 25, 26.*

MUHAMMAD YUSUF (PLAINTIFF) *v.* MUHAMMAD HUSAIN (DEFENDANT.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Evidence—Costs.*

One of two co-sharers, by ancestral title in the under-proprietary right in certain villages, obtained, in 1870, decrees against the talukdar for sub-settlement, and getting possession had his name entered in the *khewat*. The other co-sharer remained entitled to claim that this possession was held partly for him.

The present suit was brought upon two agreements, purporting to have been made in 1870, between the two co-sharers, while proceedings to obtain the above decrees were pending, to the effect that, whereas both had claims against the talukdar, one only was to sue him, the other paying half of the costs and being entitled to receive half of what might be decreed.

The Judicial Committee, upon the evidence, concluded that the Appellate Court, attributing too much to certain omissions and acts on the plaintiff's

*Present*: LORD WATSON, LORD HOBHOUSE, and SIR R. COUCH.

part, which were more or less explained, had erred in reversing the decree of the first Court, which maintained the agreements, depriving the plaintiff of his costs in that Court only.

APPEAL from a decree (18th November 1884) of the Judicial Commissioner, reversing a decree (2nd January 1884) of the Judge of the Lucknow District.

This suit, between parties having the same grandfather, was instituted on the 28th June 1883 by the plaintiff against his cousin Muhammad Husain, who had, by orders (14th November 1870, and 22nd December 1870) obtained by him in the settlement Courts, been declared to have, "along with his co-sharers if any there be," rights, as under-proprietor, as against Arjan Singh, talukdar, in villages Makunpur, Chandrauli, and Khanpur; also in a four-anna share of another village named Olehipur, forming part of a taluk named Bhilwal in the Bara Banki district.

The joint interest of the family to which the cousins belonged prior to these proceedings was shown in the records of 1858, referred to in their Lordships' judgment.

The talukdari rights in Bhilwal had been purchased in the time of the Nawabi by Arjan Singh, as was decided on 8th July 1868, in a suit brought by Imdad Ashraf, who was a sharer to the extent of twelve annas in zemindari rights in the village of Olehipur.

One of the cousins, Muhammad Husain, as to all four of the villages above named, and Imdad Ashraf as to Olehipur, asserted their zemindari claims, as against Arjan Singh, to a sub-settlement; and, to establish these rights, three suits on the 28th February 1870 were instituted against Arjan Singh by Muhammad Husain in respect of each of the three first named villages, and a fourth suit by him and Imdad Ashraf in respect of their rights in Olehipur.

These resulted in decrees in favor of Muhammad Husain, and "all entitled to share in the sub-settlement of the respective villages."

Whilst those suits were pending, the agreements, according to the plaintiff's case, were executed, which gave rise to the present suit. The first of them, referred to as No. 24, purported to

1888

MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.

have been written and signed by Muhammad Husain on 2nd May 1870, and related to the three villages first named. The second agreement, referred to as No. 25, was dated 1st September 1870, and purported to relate to the four-anna share of Olehipur. Both agreements were to the effect that, in consideration of Muhammad Yusuf's advancing one-half of the expenses that might be incurred in carrying on the litigation as to the under-proprietary right, Muhammad Husain would give up to him half of whatever he might recover, with the exception of rent-paying and rent-free *sir* land and groves, which were already held by the parties, each holding his own portion. The *khewat* of the villages, which was subsequently prepared under the terms of s. 56 of Act XVII of 1876, was verified by Muhammad Husain, whose name was entered. Notices were issued on 4th August 1871 for any claimants to come forward, but Yusuf did not then make any claim, nor did he at any time, before bringing this suit, attempt to have *dakhil kharij*, as one of the sharers in the villages, made in his name.

In the present suit the plaintiff averred that possession was obtained of the lands sued for in August 1871, and that after such possession the defendant, down to December 1879, acted according to the agreements, and accounted to the plaintiff for his share of the profits of the three first-named villages, and plaintiff received his share of the profits of the fourth village from Imdad Ashraf, who was the sub-settlement holder of that village, and was entitled to the remaining three-fourths of that village, but that in December 1879 the defendant refused to continue to give the plaintiff his share of the profits, which constituted the cause of action.

The defendant, by his written statement, denied the execution of the agreements in question, and his rendering accounts to the plaintiff after he had obtained the decrees against Arjan Singh, and that plaintiff had contributed to the costs of the suits in question. And he pleaded that under the 43rd section of the Code of Civil Procedure (*i.e.*, as to the splitting of claims), the present suit was barred by two suits which the plaintiff had brought, and in which decrees were made in March and August 1871, as to the *sir* lands and *nankar*.

1888

MUHAMMAD YUSUF v. MUHUMMAD HUSAIN.

Issues having been fixed as to the above points, the District Judge found that the agreements were proved; also that the subsequent rendering of accounts, by the defendant to the plaintiff, had taken place as alleged; while, as to any bar under s. 43, there had been no splitting of claims, the former suits having related to matters not belonging to the present one. He, however, concluded as follows: "I think the plaintiff's conduct was such that the costs of the suit should not be awarded him."

On an appeal to the Judicial Commissioner by the defendant, that Court was of opinion that the execution of the agreements was not proved. And, as to possession, the Judicial Commissioner rejected the accounts which the first Court had accepted, as the alleged writer, one Hub Lal, whom the plaintiff had examined, had denied his writing; and the Judicial Commissioner further expressed his opinion that the plaintiff's allegation as to his continuing possession till 1879 was discredited by a statement found in a petition of his in 1876, when he was applying for a certificate to enable him to appeal to Her Majesty in Council, against a decree of the Judicial Commissioner of Oudh, made in November 1875, in a suit relating to other property and brought against another party.

On this appeal,—

Mr. *R. V. Doyne*, for the appellant, argued that the agreements in question were established by the evidence, entitling the appellant to his half share. He adverted to the two annas share of Olehipur claimed, and the appellant's receipt of the profits of that share, as to which there was no defence.

Mr. *J. Graham*, *Q.C.*, and Mr. *C. W. Arathoon*, for the respondent, contended that the plaintiff had failed to prove that the agreements had been executed, or the arrangement made. They referred to the alleged reasons for the omission to register. The reason avowed by the plaintiff (though registration was not compulsory) discredited him, it being that registration was omitted, and also he did not join in the suit, in order that his and his father's interest in the property might not be known.

Mr. *R. V. Doyne*, for the appellant, was not called upon to reply.

1888

MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—In this case the suit is founded on two agreements, which are dated respectively 2nd May and 1st September 1870. The two agreements are exactly similar in character. The first, which is called No. 24 in the suit, relates to three villages, and the effect of it is this: that, whereas the plaintiff and the defendant both had claims against the talukdar for an under-proprietary right in these three villages, the claims should be prosecuted in the name of the defendant, the plaintiff paying half the costs and receiving half the profits when the right was established. The second agreement, which was No. 25, was to exactly the same effect with respect to a small portion of a village called Olehipur, which seems to have been of very little value.

Now, though the suit is founded entirely on these agreements, and not on any previous claims, it is not unimportant to consider what was the position of the parties antecedently to the agreements. As the genuineness of the agreements is disputed, it is a material consideration to see whether they contain anything that was at all of an extravagant or monstrous nature. The plaintiff and the defendant are near relatives, and at one time were indisputably co-sharers in some interest in the three villages, which were ancestral property. That is made manifest by the record of proceedings in the Settlement Court in the year 1858, when we find a petition presented by the plaintiff and defendant and two other applicants, stating that settlement had been made with those four, and praying that a fresh settlement should be made to the four, and it is mentioned that three others joined as shikmis. The order which was made on 5th May 1858 was that the settlement be made with the petitioners, and that leases be granted, and so forth. Therefore, there being on record this evidence of joint title in the plaintiff and the defendant, there is no improbability in the plaintiff's account that he intended to sue for his right in the villages, but that the arrangement was made that the defendant should sue, and that the costs should be paid, and the profits shared, in the way he states. What is certain is that the suit was instituted by the defendant against Arjan Singh, who was

1888

MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.

the talukdar against whom the sub-proprietary right was claimed. That suit failed before the Settlement Officer, but on appeal with regard to the village of Olehipur, the Commissioner gave the plaintiff a decree. That decree was made on the 4th July 1870, and it gives an under-proprietary right in mouzah Olehipur to Muhammad Husain the defendant, Imdad Ashraf who claimed for another branch of the family, and other co-sharers if any there be. After that decree was made for Olehipur, the Settlement Officer made a fresh decree for the three villages, following the Commissioner's judgment in the case of Olehipur. His decree bears date the 22nd December 1870, and is in favour of Muhammad Husain and all entitled to share the sub-settlement of the three villages.

Now under that decree the defendant obtained possession, and it seems that he got his name entered in the *khewat* to which Mr. Arathoon has just been drawing their Lordships' attention, and he holds possession up to this moment. The plaintiff being undoubtedly a co-sharer in 1858 is entitled to say that, whoever gets possession under that decree, holds partly for him.

That being the position of the parties, the only point on which the agreement gives to the plaintiff any further right than he might claim independently of the agreement, is this: that the agreement admits, as between himself and the defendant, that the plaintiff is the only party entitled to share in the benefit of the decree. How it was that the other parties named in the decree of 1853 have fallen out their Lordships do not know, but no defence was raised on that ground or on any *jus tertii*. The defendant claims that he is solely entitled, and that no agreement whatever was made with respect to the profits of the estate governed by the decree.

The main question is whether these agreements are proved. The District Judge has held that they are. The Judicial Commissioner thinks that they are not. Taking No. 24, the agreement purports to be witnessed by nine persons. No doubt some of the names were written by others on the speculation that the witnesses would ratify what was done, and other witnesses affixed their names after the agreement was executed and not at the time. That proceeding is very irregular, very improper

1888

MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.

and if any attempt had been made in this suit to represent that persons named as witnesses were there who really were not there, it would be fraudulent. But no such attempt has been made. Four witnesses have been called, and they all honestly say where they were at the time. It turns out that only one was present at the time, but no attempt has been made to conceal the fact, neither is there any contradiction of what they say upon that point. What do they say? Nawab Ali, who seems to be a perfectly independent man, says: "I signed No. 24 as witness; I cannot say where it was written. I signed in the Commissioner's cutchery." It was not written at the Commissioner's cutchery, or executed there, and he says honestly that was so; but the document was brought to him by Muhammad Husain, and he was told to witness it and he did so. It is irregular, but it is not untruthful. Then Imdad Ashraf says: "I signed No. 24. It is in Muhammad Husain's handwriting; both brought to me to sign at my house fifteen or sixteen days after it was written in Chadikapurwa." That of course is an irregular thing, but it is perfectly honest, and it shows the admission of the agreement by the parties to it. The plaintiff himself positively swears to its having been written from a previously prepared draft by the defendant in his presence, and Beni Parshad, who seems again to be perfectly independent—he is a ryot holding lands under both parties—says the same thing. He was present, and the only witness who was present. In cross-examination none of these witnesses are shaken in the least. No counter-evidence is produced. No facts are shown inconsistent with the story told by any one of the four witnesses who swore to the execution, or to their subsequent signature at the request of the defendant. They were believed by the District Judge, who says they were trustworthy witnesses, and their Lordships cannot hold that there is any contradiction of their testimony merely because other persons are named as witnesses who were shown not to have witnessed the document at all either at the time or otherwise, or because there was one who did sign the document whom the plaintiff did not think fit to call.

But then another objection is made. It is said that the document was not registered. Non-registration is no bar to the

1888

MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.

validity of the document, but it is said that the plaintiff gives as a reason for non-registration that he was committing a fraud upon the Court. The reason no doubt is very absurd. He says this: the evidence of his father Riasat Ali was of importance in the suit against Arjan Singh, and he and the defendant believed that if the plaintiff's interest was made manifest by the registration of the document, Riasat Ali's evidence would go for nothing in the suit against Arjan Singh. It is a childish mistake to make. It shows a disposition to be a little tricky. But it is not suggested that any false evidence was given in the suit against Arjan Singh; it is not suggested that by these means Riasat Ali was rendered a competent witness, whereas otherwise he would have been an incompetent witness. Nothing was done by way of fraud upon any human being. All it shows is a disposition to conceal something which happened in order that the parties might reap a benefit in the suit which was pending, and their Lordships think that quite sufficient importance has been given to the matter by the District Judge, who, on account of this little stratagem, has deprived the plaintiff of his costs in the suit.

Now, so far there is nothing in the circumstances to induce their Lordships to entertain any reasonable doubt that the parties who swore to the execution of these documents have sworn to the truth, and if the case rested there they would decide in favour of the genuineness of the documents. But the case does not rest there. There are in the record detailed accounts of the three villages which the plaintiff swears were rendered by the defendant to him, and they are also sworn by the plaintiff and others to be in the writing of one Hub Lal, a putwari of the villages, and to have been sent by the defendant to the plaintiff. One witness goes so far as to say he saw Hub Lal write the accounts. Possibly he may be wrong there. There is no need to decide whether he is right or wrong. Hub Lal denies writing or signing the accounts. But he does not deny their correctness. He does not deny that they were made out or sent, or that the payments were made upon this footing. And what is still more extraordinary is that the defendant does not come forward to say one single word about these accounts. He produces witnesses to say they are not in Hub Lal's handwriting, but he

1888

MUHAMMAD YUSUF v. MUHAMMAD HUSAIN.

himself does not say one word about them. Now, if the accounts were forged, it would be a forgery of the most portentous kind, consisting as they do of a quantity of items purporting to be holographed by Hub Lal, and setting forth the various payments and expenses for these villages. Nothing would be more easy to expose than such a forgery as that. It is quite certain that a person forging these accounts would fall into a number of mistakes, and on the mistakes being shown the forgery would be made manifest. No evidence of the kind is given. The District Judge on that evidence believed that the accounts were made out and rendered by the defendant to the plaintiff. What the Judicial Commissioner held on the point is not so easy to say. He says they are valueless, and are of no weight, and he mentions that Hub Lal has denied having written them; but whether he held they were really forgeries, or whether he held that, being genuine, and being signed, they were of no value as evidence, cannot be learned from his judgment. It is clear that they are of the greatest value as evidence, because they could not have been sent by the defendant to the plaintiff except on the footing that the plaintiff was entitled to an interest in the villages.

There is one thing more. A series of letters from the defendant to the plaintiff is produced, and the same observations, or very nearly the same observations, occur upon the letters that have been made upon the accounts, and they need not be repeated. The letters are inexplicable, excepting as referring to these agreements, and as admitting an interest on the part of the plaintiff in the three villages.

The result is that their Lordships think that the District Judge was right in giving the plaintiff a decree, and that the Judicial Commissioner was in error in disturbing that decree. He should have dismissed the defendant's appeal with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect. The respondent must pay the costs of this appeal. *Appeal allowed.*

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

CHANDI CHURN BARUA AND OTHERS (PLAINTIFFS) *v.* SIDHESWARI DEBI (DEFENDANT).

P. C.*
1888
*April* 24 & 26.

[On appeal from the High Court at Calcutta.]

*Grant, Construction of—Invalidity of grant, or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.*

A Hindu owner cannot make a conditional grant of a future interest in property in favor of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant.

The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favor of non-existing covenantees, to give the villages to them in the event specified. *Held*, that in either view, it was equally ineffectual.

*Held*, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendant you are not provided with means of maintenance," formed a condition; which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance.

APPEAL from a decree (8th July 1884) of the High Court, reversing a decree (21st September 1881) of the Subordinate Judge of the Goalpara District.

The appellants, who were plaintiffs in the suit, were a family named Barua, of the Kayest caste, which for many generations had members in the service of the Rajas of Bijni. The respondent was the widow of the late Raja, who died after the institution of this suit against him, and who represented him on this appeal.

* *Present:* LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

1888

CHANDI CHURN BARUA v. SIDHESWARI DEBI.

Of the Raj estate, that part, within which the villages now claimed were situate, had been in British territory since 1765, and the villages were settled in the pergunnah named Khutaghat; the rest of the raj estate having, since the annexation in 1864 of the Eastern Dooars, formed, like that pergunnah, part of the Goalpara district. Before 1765, the Baruas were in possession of three other villages under grant from the Rajas. They now claimed further possession of four villages in addition, under an instrument purporting to have been executed on the 15th Pous, of the Pergunnah year 1185 (December 1778), by the then Raja of Bijni, Mukund Narain Bhup. This purported to be in favor of the undermentioned Baruas, besides others of the family, who had died childless, *viz.*, Dharamsil Barua, grandfather of the plaintiff, Nandkumar Barua, and Kamlakant Barua, grandfather of the plaintiffs Chandi Churn, Jagarnath, and Chunder Madhub, agreeing that the three mouzahs, Kaitpara, Shamraipara, and Mauriagaon, that were at that time in the possession of the ancestors of the plaintiffs, should remain in their possession from generation to generation; that the sons, grandsons, heirs and representatives of the Raja Bahadoor should in future maintain the sons, grandsons and heirs of the persons in whose favor the gift was made; and that in default of this, they should relinquish to them the possession of other four mouzahs, namely, Bhotgaon, Dingaon, Daborgaon, and Salbari; and the heirs of the persons in whose favor the gift was made should be at liberty to take possession of these mouzahs, and to enjoy and possess the same as rent-free properties, by paying annually Rs. 190 as *mangon* to the estate of the Raja. And the plaintiffs alleged that in breach of that undertaking to support them by service from generation to generation, the Raja in April 1876 dismissed the first plaintiff from his service, and did not provide the other plaintiffs with service, though they were fit and proper persons and made application. And on that ground they claimed possession of the four villages.

For the defence, the genuineness of the instrument was denied, as also the plaintiffs' allegation that they were competent for the Raja's service. It was also contended for the defence that, supposing the plaintiffs to have any right to maintenance out

1888

CHANDI CHURN BARUA v. SIDHESWARI DEBI.

of the defendant's estate, the profits of the three mouzahs, already in their possession, were sufficient.

Issues were fixed by the Subordinate Judge, who found the instrument to be genuine, and held that the plaintiffs were entitled to have possession, according to the presumable intention of the parties, of the four villages. On the issue fixed by the Judge as to whether there had been any breach of the terms of the document of 1776, his decision was as follows:—

"In this document, Raja Mukund Narain recites that the grantees have, from the days of his ancestors, been supported (*parwarish*) in various ways (*har shurate*), such as by service in the kingdom, *and* by grants of villages and lands. The various ways in which they have been supported are explained to be by 'service in my kingdom *and* (not *or*) by grants of villages and lands.' The *parwarish* consisted of these two things; not of one or the other, but of both. Mukund then goes on to say that he also supports them (*pratipalan*) in the same manner (*shei mate*), *i.e.*, by service *and* by grants of villages and lands. The word *pratipalan* has clearly the same meaning as the word *parwarish*. The expression *shei mate* places this fact beyond doubt. A pure Bengali word is substituted for a Hindustani word. The Raja then says that in case in his time, or in the time of his descendants, they or their descendants should not be supported (*pratipalan*) in various ways (*har shurate*), he then and there assigns to them these seven villages as a permanent remuneration or allowance. We have already seen what the *pratipalan har shurate* means. After having thus assigned to the grantees these villages, he goes on to revoke the assignment, saying that, as they were at that time being supported (*pratipalan*) by the profits of three of the villages *and* by other means, he will not make over to them the other four villages. That they are to continue to hold the three villages on the terms they were then holding them on. He then goes on to say,—'If ever in the time of my descendants you are not provided with the means of maintenance (*pratipalan ná kare*), then let those descendants of yours who may be living at that time (*i.e.*, when there is failure of *pratipalan*) produce this deed and hold all the seven villages at a quit rent of Rs. 100.

1888

CHANDI CHURN BARUA v. SIDHESWARI DEBI.

"Now, what is this maintenance (*pratipalan-parwarish*), the failure to continue which by his descendants is contemplated by Mukund? It is clearly the *pratipálan*, the *parwarish* by various ways, *i.e.*, by service *and* by grants of land. This maintenance, as I have shown, consisted of two things, and a failure to give service, or a failure to give grants of lands, or both, would each and all constitute a breach of the terms of the document. And as no member of the Barua family is now maintained by service in the raj, although the family still hold the three villages stated by Mukund to be in their possession in 1185 Perganati, there has been a breach of the terms of the document. This breach took place on the 1st Bysack 1283 B. E., when Chandi Churn was dismissed by the defendant. This dismissal is admitted."

The Subordinate Judge, accordingly, decreed in favor of the plaintiffs.

This, however, was reversed by the High Court on appeal. A Division Bench (GARTH, C.J., and BEVERLEY, J.), after expressing doubts as to the genuineness of the instrument, gave judgment on its terms as follows:—

"Assuming that there is a sufficient consideration for the Raja's promise (about which there may be some doubt), in whose favor is the deed made?

"Is it a provision for all the Barua family in perpetuity, however many hundreds or thousands they may number?

"Does the continuance of the grant depend upon the whole Barua family continuing to serve the Raja or to reside within his jurisdiction?

"Would the grant be valid, although all the Barua family, or the large majority of them, deserted the Raja's territories, and those three or four only, or some or one of them, continued in his service?

"Or would the grant be valid if any of the Barua family refused to remain in the Raja's service at all, or proved themselves faithless or incompetent?

"All these points have been raised before us, and they present very serious difficulties, and we much doubt whether in point of law the instrument, if genuine, is enforceable at all. But

1888

CHANDI CHURN BARUA v. SIDHESWARI DEBI.

assuming that it might be so under a different state of circumstances, and that the present plaintiffs were in a position to enforce it, can it now be said that the Raja has committed any breach of the contract, or that he is liable in any way to the present plaintiffs?

"We are clearly of opinion that he is not, and our reason for that opinion seems so unanswerable that we think it needless to deal with the other points in the case, which might perhaps present more difficulty.

"The plaintiffs' case is that one of them, Chandi Churn Barua, has been dismissed from the Raja's service, and that the other have not been employed by the Raja, although they are competent men, and willing to be so employed. This the plaintiffs contend is such a breach of the Raja's contract as entitles them to be placed in possession of the four other villages, Bhotegaon, Kaitpara, Daborgaon, and Salbari.

"The Raja says that as a matter of fact the plaintiff No. 1 was dismissed because he proved a faithless servant, and he also says that the other plaintiffs are incompetent men. But whether he is right or wrong in this, what possible ground is there for the plaintiffs' present claim?

"It is clear that by the terms of the agreement the Raja Mukund Narain does not undertake to keep the whole Barua family in his service, nor any particular member or members of that family. All he undertakes to do is to support them, and it is only in case of the family not being supported that the four additional villages were to be placed at their disposal."

The suit was accordingly dismissed.

On an appeal by the plaintiffs,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellants, argued that the interpretation placed on the terms of the instrument of 1778 A.D. by the Subordinate Judge was a sound one, and that it was a genuine document. That Judge had correctly construed the Bengali words referred to in his judgment, as denoting that the maintenance was to consist of two things, service and grants of land, not merely means of subsistence, from their own or other resources. Moreover no issue had been fixed on the question whether the possession of the villages formerly given to

1888

CHANDI CHURN BARUA v. SIDHESWARI DEBI.

the Baruas was a sufficient maintenance for all the family; and the conclusion of the High Court on this point was disputed by the appellants. Even if the descendants had not been shown to be without any means of support, still, upon the correct construction of the grant, the suit had been rightly decreed by the Subordinate Judge; and the judgment of the High Court should be reversed.

Mr. *R. V. Doyne* for the respondent was not called upon.

Afterwards, on April 26th, their Lordships' judgment was delivered by

LORD WATSON.—This suit was brought by the appellants in the year 1880, before the Court of the Subordinate Judge at Goalpara, for possession of the four mouzahs of Daborgaon, Salbari, Dingaon, and Bhotegaon, which are part of the Bijni Raj estate in Assam. The original defendant was the late Raja Kumud Narain; and since his death the estate has been represented by his widow, the Ranee Sidheswari Debi, who is respondent in this appeal. The foundation of the appellants' claim is a deed alleged to have been executed by the Raja Mukund Narain, the ancestor of the defendant, in 1185 Perganati (1778 A.D.) in favour of certain members of the Barua family, to which the appellants belong. The document, according to the translation made by the Subordinate Judge, to which no exception has been taken by either of the parties, is in these terms:—

"Let peace and health rest upon your dwelling, O Kasi Nath Barua, dewan, O Ram Nath Barua, O Dharmasil Barua, O Komlakant Barua, O Ram Jibun Barua. Inasmuch as because of my having caused the daughter of Kasi Nath Barua, dewan, to lose caste by taking her away, you and all your connexions having become low in your minds, have conceived the design of abandoning my service and of withdrawing from my jurisdiction and going elsewhere, and forasmuch as from the days of the Maharajas, my deceased ancestors, you have all along been supported in various ways (*such as*) by service in my kingdom and by (*grants of*) villages and lands; and as I too am supporting you in the same manner, and as you have now become dispirited and (*therefore it is proper*) that I should show you even greater

kindness, (*I have determined that*) a means of support, that is, a perpetual wage, should be given to you; and in case in my time or in the time of my descendants, you or your descendants should not be supported in various ways (*by me or by my descendants*), then, as a means of maintenance, that is to say as wages, I do hereby assign to you seven villages, namely, Shamraipara, Mauriagram, Daborgaon, Salbari, Kaitpara, Dingaon, and Bhotegaon in the nature of a fixed (*perpetual*) remuneration. However, as you are now being supported by (*the profits derived from*) three villages and by other means, for this reason four villages have not been made over to you. Those three villages that are now in your possession by virtue of farming leases, of leases for a fixed period, and of charitable grants (*you will now hold*), and you will pay rent for them, and other dues on account of them, as you have done from heretofore. If ever in the time of my descendants you are not provided with the means of maintenance (*by them*), then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above-mentioned villages, and also of the four villages (*now held*) khas (*by me*), enjoy possession of them rent-free from generation to generation. But you will have to pay to the estate a yearly quit rent of Rs. 100. Beyond this amount I will not call upon you to pay any cesses or exactions of any kind whatsoever. These seven villages will in no way appertain to my kingdom."

It is not now disputed that Kasi Nath and Ram Jibun, two of the four grantees named in the deed, died without issue; and that the appellants are the living representatives of the other two, *viz.*, Dharmasil and Komolkant Barua. They are still in possession of the three mouzahs of Shamraipara, Mauriagram, and Kaitpara, which their four ancestors held in 1778, by virtue of farming leases or other tenures, and which were presently assigned to them by the deed; and these mouzahs now yield an annual return of 4,000*l.* sterling. As might be expected in these circumstances, the appellants do not allege in their plaint, and they do not now contend, that they have not been already provided with ample means for their support. The case which they present is, that by the terms of the deed each successive Raja

1888

CHANDI CHURN BARUA v. SIDHESWARI DEBI.

was under an obligation, either to maintain them, and that not merely by grants of land, but by employing them on his estate and paying them wages, or to give them the four villages in question; and accordingly, that the conditional grant to descendants became at once operative in their favour, when the late Raja dismissed Chandi Churn from his service in 1876, and declined to employ either him or any other of the appellants.

The real controversy between the parties turns upon the third issue adjusted in the District Court: "Is the document filed genuine, and are the plaintiffs entitled to any relief under it?" Besides disputing its genuineness, the respondent argues that the deed, in so far as concerns the disposition of the four villages claimed, is void in law; that at any rate the contingency upon which it depends is the failure of the Raja to provide maintenance, and that no claim can lie so long as the appellants have sufficient means of maintenance derived from her predecessors in the Raj.

The Subordinate Judge gave the appellants a decree in terms of their plaint. He found as matter of fact that the deed was genuine, and he held as matter of law that the conditional grant to descendants is valid and effectual, and that it became operative whenever the Raja failed to support them by giving employment as well as land. On appeal the High Court reversed his decree, and dismissed the suit with costs. The learned Judges (GARTH, C.J., and BEVERLEY, J.) held that the onus being upon them, the appellants had not satisfactorily established the authenticity of the deed. Without deciding the point, they expressed grave doubts whether, if genuine, it was enforceable in law; but, on the assumption that it was both genuine and enforceable, they held that the descendants of the four Baruas named in it have, according to the just construction of the instrument, no right to the four mouzahs so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors.

Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned Judges of the High Court have put upon the words: "If ever in the time of

my descendants you are not provided with the means of maintenance." It attributes to these words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four Baruas had actually been supported. There is an antecedent promise that these Baruas and their descendants shall in future be "supported in various ways." It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support "in various ways" simply signifies support "in some way or other"; and if the words were imported into the condition, they would not alter its meaning.

These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four mouzahs to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

The manifest purpose of the deed was to fasten upon the grantor, and his successors in the Raj, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Rajá, at any future time, to maintain these descendants, however numerous, the latter are to have immediate right to four of his villages, which thenceforth are not to "appertain to his kingdom."

Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all or (as in the present case) for generations to come, or it may be regarded as a contract, not a mere personal contrac but a covenant running with the Raj estate, and binding

1888

CHANDI CHURN BARUA v. SIDHESWARI DEBI.

its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence, is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same objections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law.

Their Lordships are accordingly of opinion that the judgment of the High Court must be affirmed and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

The appellants must pay the costs of this appeal.

*Appeal dismissed with costs.*

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

C. B.

## CRIMINAL MOTION.

*Before Mr. Justice Mitter and Mr. Justice Macpherson.*

1888

*November 26.*

ABAYESWARI DEBI (PETITIONER) *v.* SIDHESWARI DEBI (OPPOSITE PARTY).*

*Superintendence of High Court—Criminal Procedure Code (Act X of 1882, s. 144)—Charter Act, 24 & 25 Vic., c. 104, s. 15—Order to abstain from certain act.*

A Deputy Commissioner passed an order, under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants, from the ryots of two specified pergunnahs. And also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any *Adda* or *Kuchari* in such pergunnahs for a period of two months. Upon an application to set aside such order:

* Criminal Motion No. 371 of 1888, against the order passed by M. A. Gray, Esq., Deputy Commissioner of Goalpara, dated the 1st of October 1888.